STATE OF MICHIGAN

COURT OF APPEALS

MARK TORONGO,

Plaintiff-Appellant,

V

MEL FARR MOTORS, INC.,

Defendant-Appellee.

UNPUBLISHED
November 22, 2002

No. 235965
Oakland Circuit Court
LC No. 00-020566-CL

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

Defendant employed plaintiff as a service manager at its Ferndale dealership from April 1, 1998, through November 5, 1999. Defendant terminated plaintiff's employment because of what it characterized as plaintiff's inability to do the job. Plaintiff contended, however, that his employment was terminated because he refused to sign an affidavit that contained false statements. The affidavit was relevant to a class-action lawsuit against defendant, and the false statements would have supported defendant's case. Plaintiff alleged that terminating him for refusing to sign the affidavit was contrary to public policy because MCL 750.423 makes perjury a felony.[1]

Following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). In support of its motion, defendant contended that, even accepting plaintiff's pleadings as true, public policy did not prohibit an attorney from presenting a draft affidavit to plaintiff. The trial court agreed, and granted defendant's motion for summary disposition.

We review de novo a trial court's ruling on a motion for summary disposition. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10),[2] this Court considers "the

[1] Plaintiff also alleged that the termination violated the Whistleblowers Protection Act ("WPA"), MCL 15.362. However, plaintiff is not challenging the trial court's dismissal of his WPA claim.

[2] Although the trial court did not specify a court rule in granting defendant's motion for summary
(continued…)

affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

As noted above, plaintiff alleged that his termination was contrary to public policy. Generally, "either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). However, the *Suchodolski* Court noted:

> [A]n exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty.
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> The courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges. Such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. [*Id.* at 695.]

In addition, some courts have prohibited retaliatory discharges "when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment." *Id.* at 695-696.

Here, plaintiff specifically pleaded that defendant terminated plaintiff's employment because he refused "to commit perjury by signing an untruthful affidavit" (complaint, ¶ 34). MCL 750.423 provides:

> Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully [sic] swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than fifteen [15] years.

Thus, if plaintiff was terminated for refusing to commit perjury, an argument could certainly be made that the termination was contrary to public policy. *Suchodolski*, *supra* at 695-696.

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disposition, it appears that the trial court went beyond the pleadings in considering whether there was a genuine issue of fact. Accordingly, the motion must have been granted pursuant to MCR 2.116(C)(10).

However, plaintiff cites no authority establishing that a request to sign an affidavit that contains false statements is tantamount to a request to commit perjury, where, as here, there is no evidence that defendant's in-house counsel was even aware that the affidavit contained false statements. For example, there is no evidence that defendant's in-house counsel consulted with plaintiff before drafting the affidavit. As such, it is far from clear that the request to sign the affidavit was a request to commit perjury.

Moreover, we note, as did the trial court, that plaintiff never requested that the affidavit be corrected. Accordingly, there is no indication that defendant's in-house counsel was unwilling to prepare an affidavit that plaintiff deemed accurate. Also, there is no evidence indicating that defendant's in-house counsel attempted to coerce plaintiff into signing the affidavit. Instead, plaintiff testified that he was told to either sign the affidavit or not sign it. In the absence of any threats or coercive behavior by defendant's in-house counsel, it is certainly questionable whether plaintiff's refusal to sign the affidavit led to the termination.

In addition, there is substantial evidence supporting a conclusion that plaintiff was fired for reasons other than his purported refusal to sign the affidavit. The record is replete with references to plaintiff's inability to perform the job, such as the many personality conflicts with subordinate employees and customers.[3] As such, we are not persuaded that reasonable minds could differ in finding that defendant terminated plaintiff because of his inability to perform the job.[4] *Haliw, supra* at 302. As a result, we do not believe that the trial court erred in granting defendant's motion for summary disposition. *Id.*

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

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[3] Indeed, plaintiff's testimony that he threatened defendant's in-house counsel when presented with the inaccurate affidavit, rather than trying to have the affidavit corrected, supports his supervisors' testimony that plaintiff had trouble getting along with people.

[4] To be sure, it is troublesome that defendant received a raise shortly before his termination. However, defendant's supervisor testified that he occasionally tried to eliminate poor pay as a cause for poor performance and that the adjustment to plaintiff's bonus structure would not have been necessary if plaintiff was performing better.